U.S. Department of Justice

United States Attorney
Southern District of New York

The Silvio J. Mollo Building
One Saint Andrew's Plaza
New York, New York 10007

September 17, 2021

BY ECF
The Honorable P. Kevin Castel
United States District Judge
Southern District of New York
Daniel Patrick Moynihan U.S. Courthouse
500 Pearl Street
New York, New York 10007

Re: *United States v. Virgil Griffith*, 20 Cr. 15 (PKC)

Dear Judge Castel:

The Government writes pursuant to the Court's Orders of September 12, 2021 and September 13, 2021 (Dkt. 158, 160), and in accordance with the Court's direction at the September 14, 2021 final pretrial conference, to provide the declarations ordered by the Court and to further oppose the defendant's motion to compel additional discovery at this juncture. The attached declarations confirm that, since the conclusion of the search of material on the Platform on September 14, 2020, no member of the prosecution team has conducted or directed another to conduct a search of material on the Platform[1] deemed to be not pertinent to the applicable search warrants, or has knowledge of any other member of the prosecution team having done so. Accordingly, and for the reasons that follow, the Government respectfully requests that the Court (i) deny the defendant's pretrial motion to suppress; (ii) deny the defendant's motion to compel without prejudice; and (iii) hold the defendant's motion to dismiss the Indictment in abeyance until after trial. The Government respectfully submits that the Court can set a briefing schedule following the conclusion of trial to address any unresolved portions of the defendant's motions.

I. The Declarations

In response to the questions set forth in paragraph 1 of the Court's September 12 Order, the Government encloses twelve declarations of current and former members of the prosecution

[1] The "Platform" referenced herein and in the attached declarations is the document hosting platform identified in the Government's initial disclosure to the Court and the defense dated August 24, 2021. (*See* Dkt. 132.)

team, as well as other FBI personnel who assisted the prosecution team in the review of the Facebook and Twitter search warrant returns (the "Search Warrant Returns") that were loaded onto the Platform and are at issue in the defendant's motions. (*See* Exhibits A-L.) As reflected in the attached declarations, no member of the prosecution team conducted, directed another to conduct, or is aware of another conducting, a search of material in the Search Warrant Returns deemed to be non-pertinent after the conclusion of the search of those returns pursuant to the applicable warrants on September 14, 2020. Contrary to the defendant's assertion (*see* Dkt. 157 at 17-19), because this case involved unauthorized access to the Search Warrant Returns by FBI personnel who were not members of the prosecution team (and who acted, albeit unknowingly, in contravention of instructions by the prosecutors to the prosecution team regarding the execution of the relevant warrants), *Wey* and *Nejad* are inapposite and blanket suppression is not warranted. Accordingly, the Government respectfully submits that the Court should deny the defendant's pretrial motion to suppress evidence that was hosted on the Platform. (*See* Sept. 14, 2021 Tr. (attached as Exhibit M) at 29-30 ("I am going to, number one, make sure that the representation that was made [in the Government's August 24 letter] with regard to members of the prosecution team accessing material is correct."); *id.* at 39-40 ("If the government is able to make clean representations along the lines I indicated, then I am not suppressing the evidence prior to trial, I'm not dismissing the indictment, but the issue is reserved until after trial.").)

II. The Court Should Deny the Motion to Compel Without Prejudice

In his motions dated September 10, 2021, the defendant sought to compel (i) a detailed update on the Government's continuing investigation into access to the Search Warrant Returns on the Platform; (ii) the production of all communications "involving this situation" between the prosecution team, the Platform, and anyone who viewed the defendant's data on the Platform from the start of the case to the present; and (iii) the production of all communications from August 11, 2021 to the present between the prosecution team and "any other document platforms that might be hosting data for the government in this case." (Dkt. 157 at 20-21.) For many of the same reasons set forth in the Government's September 13 letter (Dkt. 160), and as discussed below, this motion should be denied without prejudice to renewal after trial, when the Court takes up any unresolved portions of the defense motions to dismiss and suppress.

A. The First Defense Request

As the Court is aware, on August 24, 2021, the Government filed a letter notifying the Court and the defense that four FBI employees not part of the prosecution team had accessed the Search Warrant Returns on the Platform in connection with separate investigations, and providing an initial report on the Government's inquiry into the matter. Below, the Government provides a further update on its inquiry and additional background regarding access to the Search Warrant Returns on the Platform. The Government submits that the provision of this additional update satisfies the defendant's first request for an "update on the government's continuing investigation." (Dkt. 157 at 20.) The Government's inquiry remains ongoing, and the Government will provide after trial any necessary further information that is learned during the inquiry and subject to its

discovery obligations in this case, in connection with the proposed briefing on any unresolved portions of the defendant's motions.

Prior to beginning the searches of returns for the defendant's electronic accounts obtained during the investigation, including the Search Warrant Returns, prosecutors discussed with FBI personnel on the prosecution team the review procedures that were to be used. In connection with those discussions, the prosecutors instructed the FBI case agent about the need to first identify material responsive to the applicable warrant, to mark that material electronically as responsive to the warrant, and not to return to material deemed non-pertinent once the search of the account was concluded. In the course of the review, the prosecutors conveyed those instructions to the rest of the prosecution team.

Shortly after uploading the Search Warrant Returns onto the Platform on March 10, 2020, the FBI case agent recalls adding members of the prosecution team to a list in the Platform, which he believed was necessary to allow access to the databases (or "projects") hosting the Search Warrant Returns. However, as explained below, in August 2021, the case agent and prosecutors learned that the Search Warrant Returns could be accessed through a broader search feature on the Platform that functioned as designed to enable FBI personnel to search across data hosted on the Platform, including the Search Warrant Returns.

From March 10, 2020 until September 14, 2020, FBI personnel and prosecutors on the prosecution team accessed the Search Warrant Returns to conduct the search authorized by the relevant warrants. The prosecution team also engaged other FBI employees to assist in the review given the large volume. During that search, reviewers used the Platform to "tag" (i.e., electronically mark) communications and other content deemed responsive to the warrants ("Identified Material"), certain of which Identified Material the Government plans to offer at the upcoming trial. The case agent recalls that during the review, he learned that he could provide access to the Search Warrant Returns on the Platform to others within the FBI by giving them a unique URL that led to the location of the Search Warrant Returns in the Platform, and allowed those FBI personnel to review the data without the need for further steps or permissions. The case agent provided that URL only to members of the prosecution team and those assisting with the search. The search of the Search Warrant Returns on the Platform was completed on September 14, 2020.

At the conclusion of the search in September 2020, the case agent and prosecutors took steps in an effort to ensure that the non-Identified Material could not be accessed on the Platform going forward. The case agent first tried to segregate the Identified Material by restricting access to any non-Identified Material in the Platform, and was informed by employees of the Platform that this was not feasible. The case agent then tried to remove the prosecution team's ability to access the Search Warrant Returns on the Platform. Beginning in September 2020 and continuing through December 2020, members of the prosecution team participated in calls and emails with Platform employees to pursue these steps. However, Platform employees informed the prosecutors and case agent that, unless the Search Warrant Returns were removed from the Platform entirely, it was not technologically feasible to remove the prosecution team's ability to access the Search

Warrant Returns on the Platform, or to electronically segregate the Identified Material from the non-Identified Material on the Platform, such that retaining access to the Identified Material on the Platform would require maintaining access to the non-Identified Material as well. On January 8, 2021, the case agent sent an email to the undersigned confirming that, despite his efforts, the Search Warrant Returns remained on the Platform, and that "[w]e cannot restrict the access to that data unless we delete the projects." In the context of the correspondence reflected above, the case agent and the undersigned understood the phrase "restrict the access" to be a reference to restricting access to the Platform by members of the prosecution team. The case agent explained further in the email that if the Search Warrant Returns were deleted from the Platform, it would not be possible to retain the "flags" denoting the Identified Material for viewing in the Platform. The case agent left the Search Warrant Returns in the Platform pending further direction.

Following the events described above, the undersigned believed that the Search Warrant Returns remained accessible on the Platform only to the prosecution team and FBI personnel who had assisted in the review at the direction of the prosecution team. The case agent similarly understood that access was restricted to the prosecution team and the other FBI personnel who had assisted in the search and received from him the unique URL. In light of this understanding, the undersigned determined that, instead of removing the full Search Warrant Returns from the Platform, which would have eliminated the ability to access the Identified Material on the Platform, and because of the desire to maintain the ability to export Identified Material from the Platform in a form that would facilitate the later marking of exhibits for trial, the Search Warrant Returns should remain on the Platform, and we instructed the prosecution team not to access the Search Warrant Returns in the Platform going forward without explicit authorization from the prosecutors. And as reflected in the attached declarations, members of the prosecution team in fact did not search any of the non-Identified Material in the Platform after the completion of the search on September 14, 2020.

It was not until August 11, 2021—when, as set forth in the Government's August 24 initial disclosure letter, the case agent learned from another FBI agent not on the prosecution team that the Search Warrant Returns had been accessed on the Platform during a separate investigation conducted by a different FBI office—that the case agent and the undersigned became aware that the Search Warrant Returns were in fact searchable through a broader search function on the Platform that, by design, enabled FBI employees to run searches across the data housed on the Platform. (Dkt. 132 at 2.) Upon learning that, the FBI promptly removed the Search Warrant Returns from the Platform at the direction of this Office, and this Office and the FBI began an inquiry into the matter. (*Id.* at 2-3.)

The Government's inquiry has included, among other things, interviews with members of the prosecution team, the FBI personnel who assisted in the review of the Search Warrant Returns, and the FBI personnel outside the prosecution team who accessed the Search Warrant Returns, as well as the review of audit data provided by the Platform. The Government's inquiry to date has determined that, as detailed in our August 24 letter, the Search Warrant Returns were accessed on the Platform by only four current or former FBI employees not associated with the Griffith investigation, as a result of searches run on five dates between May 2020 and August 2021; and

that, as reflected in the attached declarations, no member of the prosecution team searched non-Identified Material after the completion of the search of the Search Warrant Returns on September 14, 2020.

Finally, the Government wishes to apprise the Court and the defense of two additional facts stemming from its inquiry. First, the Government learned that, on or about September 9, 2021, in order to assist in the creation of trial exhibits, an FBI analyst on the prosecution team conducted a search of and downloaded certain material from an extraction of Griffith's iPad (not the Search Warrant Returns), which extraction, unbeknownst to the analyst prior to opening the material, may have contained material non-responsive to the relevant search warrant. Upon realizing that the particular extraction appeared to contain material that had not been "tagged" as responsive, the analyst closed the extraction, deleted what she had downloaded, and reported the access to the undersigned. Second, as part of the Government's ongoing inquiry, and subsequent to the review of the audit log discussed in our August 24 letter, this Office requested additional audit data from the Platform, which was provided to the FBI. When the undersigned began viewing that audit data earlier this week, we quickly recognized that the data appeared to contain some content from the Search Warrant Returns embedded within the data, and we could not tell whether the material was Identified Material or not. Accordingly, the undersigned immediately ceased review of this audit data and began working with the Platform to obtain audit data that would not include any such content. These two facts described above do not bear on the defendant's motions, but we nonetheless include them in our update to the Court and the defense regarding the steps the Government has taken and will continue to take to investigate this matter.[2]

B. The Second and Third Defense Requests

The defendant's second request seeks internal FBI, U.S. Attorney's Office, and Platform communications about "this situation" with no temporal limitation. (Dkt. 157 at 20-21.) This request remains premature and overbroad, and should be denied without prejudice. As described in our letters of August 24 and September 13, 2021 (Dkt. 132, 160), the Government has already produced to the defense the notes of our conversations with the four current and former FBI

[2] The Government also notes that, on September 24, 2020 and again on September 9, 2021, the Government notified the defense that, in the course of preparation for trial, Government personnel will access original search warrant material, including the Search Warrant Returns, in order to properly authenticate exhibits for trial. This procedure is necessary and entirely proper under this Circuit's precedent because, absent a stipulation from the defense, the Government will need to authenticate that, for example, certain exhibits were excerpted from electronic accounts belonging to Griffith. *See United States v. Ganias*, 824 F.3d 199, 215 (2d Cir. 2016) ("Preservation of the original medium or a complete mirror may therefore be necessary in order to safeguard the integrity of evidence that has been lawfully obtained or to authenticate it at trial."). The Government will only retrieve material previously identified as responsive in the course of preparing exhibits through this process.

employees outside the prosecution team who, according to the audit from the Platform, which was also produced to the defense, accessed information from the Search Warrant Returns maintained on the Platform. The Government is working to complete its inquiry into this matter. For example, as described above, we have worked with the Platform to generate another audit that may provide additional information about these accesses of the Search Warrant Returns. In light of the additional update that the Government has provided above regarding its continuing investigation, the information already provided in the August 24 disclosure letter and produced to the defense, and the content of the attached declarations, the Government respectfully submits that the defendant's request for additional internal communications about this matter should be denied at this time.

The defendant's third request, which seeks internal FBI and U.S. Attorney's Office communications since August 11, 2021 about "any other document platforms that might be hosting data for the government in this case," is overbroad, at the very least premature, and should be denied at this time. As set forth in the initial August 24 disclosure, as part of its inquiry, the Government has conducted a review of all other search warrant returns received in this case and confirmed that those returns were loaded onto other platforms for which access was restricted to the prosecution team who conducted the searches and technical and support staff who manage the various platforms. (Dkt. 132 at 3.) In the absence of any indication of an issue relating to the accessing of data maintained on these other platforms, the defendant's third request is overbroad and does not address the issue at hand that has actually been identified.

For the reasons set forth above and in the Government's prior filings relating to this matter on August 24 and September 13, and for the reasons discussed at the September 14 conference, the Government respectfully submits that the Court should (i) deny the defendant's pretrial motion to suppress; (ii) deny the defendant's motion to compel without prejudice; and (iii) hold the defendant's motion to dismiss the Indictment in abeyance until after trial, at which time a briefing schedule can be set to address any unresolved portions of the defendant's motions.

Respectfully submitted,

AUDREY STRAUSS
United States Attorney

By: /s
Kyle A. Wirshba
Kimberly J. Ravener
Assistant United States Attorneys
(212) 637-2493 / 2358

Cc: Defense Counsel (by ECF)

Exhibit A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA	
- v. -	20 Cr. 15 (PKC)
VIRGIL GRIFFITH,	
Defendant.	

State of New York)
County of New York : ss.:
Southern District of New York)

Juliana Aragon, pursuant to Title 28, United States Code, Section 1746, hereby declares under penalty of perjury:

1. I am a Tactical Specialist with the Federal Bureau of Investigation.

2. I participated in the investigation of Virgil Griffith.

3. After September 14, 2020, I did not conduct or direct another to conduct any search of material on the Platform deemed to be not pertinent to the applicable search warrants issued in the above-captioned case, and I do not have any knowledge of any other member of the prosecution team having done so.

Dated: New York, New York
September 17, 2021

Juliana Aragon
Tactical Specialist

Exhibit B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA	:	
- v. -	:	20 Cr. 15 (PKC)
VIRGIL GRIFFITH,	:	
Defendant.	:	

State of New York)
County of New York : ss.:
Southern District of New York)

Alec Bugg, pursuant to Title 28, United States Code, Section 1746, hereby declares under penalty of perjury:

1. I am an Investigative Analyst with the Federal Bureau of Investigation ("FBI").

2. I participated in the investigation of Virgil Griffith.

3. After the conclusion of the search of materials on the Platform, which I understand to be September 14, 2020, I did not conduct or direct another to conduct any search of material on the Platform deemed to be not pertinent to the applicable search warrants, and I do not have any knowledge of any other member of the prosecution team having done so.

Dated: New York, New York
September 17, 2021

Alec Bugg
Investigative Analyst

Exhibit C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA	:	
- v. -	:	20 Cr. 15 (PKC)
VIRGIL GRIFFITH,	:	
Defendant.	:	

State of New York)
County of New York : ss.:
Southern District of New York)

Matthew L. Charles, pursuant to Title 28, United States Code, Section 1746, hereby declares under penalty of perjury:

1. I am a Supervisory Special Agent with the Federal Bureau of Investigation.

2. I participated in the investigation of Virgil Griffith.

3. After September 14, 2020, I did not conduct or direct another to conduct any search of material on the Platform deemed to be not pertinent to the applicable search warrants issued in the above-captioned case, and I do not have any knowledge of any other member of the prosecution team having done so.

Dated: New York, New York
September 17, 2021

Matthew L. Charles
Supervisory Special Agent

Exhibit D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA	
- v. -	20 Cr. 15 (PKC)
VIRGIL GRIFFITH,	
Defendant.	

State of New York)
County of New York : ss.:
Southern District of New York)

Bradford Coyle, pursuant to Title 28, United States Code, Section 1746, hereby declares under penalty of perjury:

1. I am a Special Agent with the Federal Bureau of Investigation ("FBI").

2. I participated in the investigation of Virgil Griffith.

3. After September 14, 2020, I did not conduct or direct another to conduct any search of material on the Platform deemed to be not pertinent to the applicable search warrants issued in the above-captioned case, and I do not have any knowledge of any other member of the prosecution team having done so.

Dated: New York, New York
September 17, 2021

Bradford Coyle
Special Agent

Exhibit E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA	
- v. -	20 Cr. 15 (PKC)
VIRGIL GRIFFITH,	
Defendant.	

State of New York)
County of New York : ss.:
Southern District of New York)

Caroline Jordan, pursuant to Title 28, United States Code, Section 1746, hereby declares under penalty of perjury:

1. I am a Special Agent with the Federal Bureau of Investigation.

2. I participated in the investigation of Virgil Griffith.

3. After September 14, 2020, I did not conduct or direct another to conduct any search of material on the Platform deemed to be not pertinent to the applicable search warrants issued in the above-captioned case, and I do not have any knowledge of any other member of the prosecution team having done so.

Dated: New York, New York
September 17, 2021

Caroline Jordan
Special Agent

Exhibit F

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA	:	
- v. -	:	20 Cr. 15 (PKC)
VIRGIL GRIFFITH,	:	
Defendant.	:	

State of New York)
County of New York : ss.:
Southern District of New York)

Raymond Yi, pursuant to Title 28, United States Code, Section 1746, hereby declares under penalty of perjury:

1. I am a Special Agent with the Federal Bureau of Investigation.

2. I participated in the investigation of Virgil Griffith.

3. After September 14, 2020, I did not conduct or direct another to conduct any search of material on the Platform deemed to be not pertinent to the applicable search warrants issued in the above-captioned case, and I do not haye any knowledge of any other member of the prosecution team having done so.

Dated: New York, New York
September 17, 2021

Raymond Yi
Special Agent

Exhibit G

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA	:	
- v. -	:	20 Cr. 15 (PKC)
VIRGIL GRIFFITH,	:	
Defendant.	:	

State of New York)
County of New York : ss.:
Southern District of New York)

Brandon Cavanaugh, pursuant to Title 28, United States Code, Section 1746, hereby declares under penalty of perjury:

1. I am a Special Agent with the Federal Bureau of Investigation.

2. I participated in the investigation of Virgil Griffith.

3. After September 14, 2020, I did not conduct or direct another to conduct any search of material on the Platform deemed to be not pertinent to the applicable search warrants issued in the above-captioned case, and I do not haye any knowledge of any other member of the prosecution team having done so.

Dated: New York, New York
September 17, 2021

Brandon Cavanaugh
Special Agent

Exhibit H

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA	:	
- v. -	:	20 Cr. 15 (PKC)
VIRGIL GRIFFITH,	:	
Defendant.	:	

State of New York)
County of New York : ss.:
Southern District of New York)

Charlotte Cooper, pursuant to Title 28, United States Code, Section 1746, hereby declares under penalty of perjury:

1. I am a Paralegal Specialist in the Office of Audrey Strauss, United States Attorney for the Southern District of New York.

2. I participated in the investigation of Virgil Griffith.

3. After September 14, 2020, I did not conduct or direct another to conduct any search of material on the Platform deemed to be not pertinent to the applicable search warrants issued in the above-captioned case, and I do not have any knowledge of any other member of the prosecution team having done so.

Dated: New York, New York
September 17, 2021

Charlotte Cooper

Exhibit I

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA	:	
- v. -	:	20 Cr. 15 (PKC)
VIRGIL GRIFFITH,	:	
Defendant.	:	

State of New York)
County of New York : ss.:
Southern District of New York)

Michael Krouse, pursuant to Title 28, United States Code, Section 1746, hereby declares under penalty of perjury:

1. I am an Assistant United States Attorney in the Office of Audrey Strauss, United States Attorney for the Southern District of New York.

2. I participated in the investigation of Virgil Griffith.

3. After September 14, 2020, I did not conduct or direct another to conduct any search of material on the Platform deemed to be not pertinent to the applicable search warrants issued in the above-captioned case, and I do not have any knowledge of any other member of the prosecution team having done so.

Dated: New York, New York
September 17, 2021

Michael Krouse
Assistant United States Attorney

Exhibit J

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA	:	
- v. -	:	20 Cr. 15 (PKC)
VIRGIL GRIFFITH,	:	
Defendant.	:	

State of New York)
County of New York : ss.:
Southern District of New York)

Shawn Milione, pursuant to Title 28, United States Code, Section 1746, hereby declares under penalty of perjury:

1. I am a former Paralegal Specialist in the Office of Audrey Strauss, United States Attorney for the Southern District of New York.

2. I participated in the investigation of Virgil Griffith.

3. After September 14, 2020, I did not conduct or direct another to conduct any search of material on the Platform deemed to be not pertinent to the applicable search warrants issued in the above-captioned case, and I do not have any knowledge of any other member of the prosecution team having done so.

Dated: New York, New York
September 17, 2021

Shawn Milione

Exhibit K

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA	
- v. -	20 Cr. 15 (PKC)
VIRGIL GRIFFITH,	
Defendant.	

State of New York)
County of New York : ss.:
Southern District of New York)

Kimberly J. Ravener, pursuant to Title 28, United States Code, Section 1746, hereby declares under penalty of perjury:

1. I am an Assistant United States Attorney in the Office of Audrey Strauss, United States Attorney for the Southern District of New York.

2. I participated in the investigation of Virgil Griffith.

3. After September 14, 2020, I did not conduct or direct another to conduct any search of material on the Platform deemed to be not pertinent to the applicable search warrants issued in the above-captioned case, and I do not have any knowledge of any other member of the prosecution team having done so.

Dated: New York, New York
September 17, 2021

Kimberly J. Ravener
Assistant United States Attorney

Exhibit L

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA	:	
- v. -	:	20 Cr. 15 (PKC)
VIRGIL GRIFFITH,	:	
Defendant.	:	

State of New York)
County of New York : ss.:
Southern District of New York)

Kyle A. Wirshba, pursuant to Title 28, United States Code, Section 1746, hereby declares under penalty of perjury:

1. I am an Assistant United States Attorney in the Office of Audrey Strauss, United States Attorney for the Southern District of New York.

2. I participated in the investigation of Virgil Griffith.

3. After September 14, 2020, I did not conduct or direct another to conduct any search of material on the Platform deemed to be not pertinent to the applicable search warrants issued in the above-captioned case, and I do not have any knowledge of any other member of the prosecution team having done so.

Dated: New York, New York
September 17, 2021

Kyle A. Wirshba
Assistant United States Attorney

Exhibit M

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

UNITED STATES OF AMERICA,

v. 20 CR 15 (PKC)

VIRGIL GRIFFITH,

Defendant.

----------x

New York, N.Y.
September 14, 2021
4:40 p.m.

Before:

HON. P. KEVIN CASTEL,

District Judge

APPEARANCES

AUDREY STRAUSS,
United States Attorney for the
Southern District of New York
KIMBERLY RAVENER
KYLE ADAM WIRSHBA
Assistant United States Attorneys

BRIAN EDWARD KLEIN
SEAN STEPHEN BUCKLEY
KERI CURTIS AXEL
Attorneys for Defendant

(Case called)

MS. RAVENER: Good afternoon, your Honor. Kimberly Ravener and Kyle Wirshba, for the government.

THE COURT: Good afternoon to you both.

And for the defendant?

MR. KLEIN: Good afternoon, your Honor. Brian Klein, with Keri Axel and Sean Buckley, and sitting next to me is the defendant, Virgil Griffith. He's in custody.

THE COURT: Good afternoon to you all. Thank you for accommodating me. I am trying a case in Courtroom 23B of this courthouse, and we broke early with the jury, and I appreciate your accommodating my schedule.

So let's talk about motions in limine.

I have received and reviewed the motions, the responses to the motions, and I assume the parties have said what they wanted to say in their motion papers.

Is that correct, for the government?

MS. RAVENER: It is, your Honor.

THE COURT: For the defendant?

MR. KLEIN: Yes, your Honor. We may want to add a little bit on --

THE COURT: Sure. No, go right ahead.

MR. KLEIN: Your Honor, because there have been other filings since the time of that filing, in particular, the government has filed things related to its expert and raised

different issues, and I think one of the motions they filed was to exclude the defense from introducing into evidence our argument what they term extraneous evidence regarding the DPRK.

THE COURT: All right. Well, we'll get to that, and when we get to that, you'll let me know what you want to raise.

But, first, let's start with the argument on statements. Is there anything you wanted to add on that, Mr. Klein?

MR. KLEIN: In terms of our opposition?

THE COURT: Yes.

MR. KLEIN: No.

THE COURT: Okay.

So, first of all, I think the defense is correct in the following respects:

Number one, that I don't know, and they don't know, the full extent of statements that are being offered, nor they say are they in a position to have a view on authenticity. And I'll add on to that, that with regard to 403 considerations, I don't fully know whether or not something may have -- the probative value may be outweighed by, for example, danger of unfair prejudice or jury confusion in all instances. I can't possibly know that.

But there is a fundamental point to start with, and that is with regard to the indictment in this case, and there is an argument that Griffith's initial attempts to develop what

the government calls cryptocurrency infrastructure in the DPRK is excludable. And reading the flavor of the briefs that have been submitted in this case, it is as if Mr. Griffith was charged with conspiracy to attend a conference in the DPRK. That's the crime he's charged with committing.

That's not what the grand jury indicted him for.

So let's begin with the first principles. The grand jury indicted him for participation in a conspiracy, from at least in or about August 2018 up to and including in or about November 2019, to conspire to violate licenses, orders, regulations, and prohibitions in the IEEPA, and that's the charge, and there are two objects. One is that it was part of the conspiracy that Griffith and others would and did provide and cause others to provide services to the DPRK. That's one of the two objects. The second object is that Griffith and others conspired to evade and avoid and attempt to evade and avoid the requirements of U.S. law with respect to providing services to the DPRK.

So those are the two objects of the conspiracy that runs from August 2018 up to 2019.

Now, the government says it is seeking to offer statements in the period of February 2018 through June of 2018, and they are not during or in furtherance of the conspiracy. They don't come in as proof, direct proof, of conduct during the conspiracy. They are, however, it seems to me, the ones

that have been tendered, background to the conspiracy, and, further, they are not hearsay because, under 801(d)(2), they're offered against the opposing party and they're party statements.

So, for example, the government wants to offer the February 17th, 2018 message to CC3, and he asks CC3 whether he knew anyone in North Korea, we'd love to make an Ethereum trip to DPRK to set up an Ethereum node, and he adds that it will help them circumvent the current sanctions on them.

Well, the message has nothing whatsoever to do with the fact that the Singaporean later on, the government contends, became a member of the conspiracy. That's not why this comes in; it comes in as a party statement and as background to the conspiracy.

Similarly, with regard to the April 2018 emails, Virgil is the guy who would like to get the node started, and Griffith then wrote to CC4 that he was willing to spend $8,000 on ItNix, explain the steps "buying the mining rig, ship it to them, pay someone or some entity to continue maintaining it."

The statements of others cannot be admitted for the truth of their content. And it seems to me that Griffith's statement comes in; the other statements only comes in in the context of shedding light on what it is that Griffith is saying, and they're not for their truth. So that's where I come out. There's a continued exchange on or about that date

with other statements, but the gist of it is that party statements by Griffith are not hearsay and they're relevant as background to the conspiracy.

The same, June 30, 2018, Griffith emails CC5, tells CC5 he's seeking for and introducing potential business partners or personnel to the company, and he says that it's an exchange about the South Korean government being open to supporting The Ethereum Foundation. Now, here, on this email, I'm not sure if it's probative of anything relative to the background to the conspiracy, and so I have to reserve on something like that. I don't know whether it's relevant or not; it may not be.

Now, with regard to the August 7th exchange, this is -- of course, the grand jury says that the conspiracy started in or about August 2018 and the August 7th exchange is with CC4, but I cannot determine that CC4 was then a member of the conspiracy. I don't have any basis to conclude that. But Griffith's statements would come in as party statements, background, and CC4's and CC5's would be necessary in order to understand what Griffith is saying, not for the truth of their content.

August 24, 2018, Griffith writes a long paragraph to CC5 asking if South Korea wanted to curry our favor by setting up the DPRK node because we would do it myself, ourselves, but we're scared of the sanctions. It seems to me that South Korea

is allowed to violate those sanctions. I've been asked to step away from the project, but if you ever see a lead to do this, we'd love you for it. That comes in as a party statement.

CC5's response, it's quite sensitive, so I have to be careful, too — I don't think that comes in because, first of all, it's not a coconspirator statement at this point. CC5 hasn't been shown to have joined the conspiracy. And it's not, as far as I can tell, necessary to the understanding of Griffith's statements on August 24, 2018.

On September 23, 2018, Griffith emails an individual asking if he would be interested in setting up the DPRK node and forwarding some of the CC4 communications. That comes in, again, as a party statement, at least on background; it's not conspiratorial conduct, but it certainly comes in as a party statement. Whether there is any other evidentiary basis for it, I can't say at this stage.

And, certainly, messages by Griffith to a DPRK email account asking, can Americans attend the conference, yes, no problem — this is a statement during, and in furtherance of, the conspiracy.

Now, with all statements made during and in furtherance of the conspiracy, they're subject to connection. They are subject to the strictures of the *Bourjaily* case and the case law under *Bourjaily*, so they're all subject to being stricken if, at the end of the government's case, I cannot find

by a preponderance of the evidence that the declarant was a member of the conspiracy when the statement was made and that the statement was during and in furtherance of the conspiracy.

But preliminarily, and subject to that statement, the August 27, 2019 communication from CC2 to Griffith would seem to come in.

The August 31, 2019 statement is not by a member or a purported member of the conspiracy; it's just an individual who asks why is Griffith willing to risk his safety to go to the DPRK, and he responds: DPRK wouldn't want to scare away blockchain talent. That'll let them get around sanctions.

So individual 3's statement is not for the truth of its content, but Griffith's statement is a party statement.

Then we have the DPRK invitation that's proof of the conspiracy listing CC1 and CC2 as organizer and technical advisor. Certainly the December 19, 2019 initial payment comes in.

The January 24th, 25th, and 27th exchanges are, at minimum, party statements bearing on Griffith's intent, even to the extent that they're with Individual 4, who was not a member of the conspiracy they still are party statements.

The February 14 communication with CC1 is, it appears, likely a statement by a coconspirator during and in furtherance of the conspiracy, as is Griffith's communications on February 18th, February 28th, and March 7th of 2019.

There were statements made by Griffith and others during the conference, and they are direct proof of the conspiracy. To the extent they are statements by persons who were not coconspirators, they come in for the fact that they were said, because it's part of the back-and-forth and the interchange, and if they're coconspirators, then they're potentially in furtherance of the conspiracy.

Likewise, the communications on April 20, 26th, 27th, and May 14th look like they're likely statements during and in furtherance of the conspiracy, except for the April 26th to Griffith's parents, which is nothing more than a party statement, not a coconspirator statement.

And, similarly, the statements made by Griffith to law enforcement on May 22nd, 2019, November 6th and November 12th, 2019, they're party statements.

Now, with regard to the May 23rd, 2019 exchange, this is about you should get your taxes in order, that ordinarily, I would say, would not come in if that's all it was about, it would not even come in for the truth of its content, but it's Griffith's response that makes this relevant in terms of consciousness of guilt. The email could be reasonably read to indicate he's not at all concerned about taxes, but his engaging in other conduct could result in his imprisonment.

The statements, again, from August 4th, 2019, August 5th, August 7th, August 9th, October 2, October 28, and

November 2018 -- well, let me leave November 2018 out -- the ones I just mentioned, they're either coming in as statements and the rest of the conversation with the other party to the conversation is coming in, either to make the statement, party statement, understandable, or some of them, for example, with CC2, may come in, and CC1, for the truth of their content.

With regard to the November 18 communication, I discovered I didn't file a tax return for 2015-2018, but, weirdly, the IRS hasn't contacted me, that's out. I don't see where -- the probative value to that is outweighed by the danger of unfair prejudice, so I'm excluding that.

November 17 comes in as a party statement.

So that's where I am on the statements, and I have some sympathy for what the defense says, that they don't know the full context, they don't know the foundation, et cetera. Some of that may be developed at trial, and there may be instances where you'll able to persuade me that something that didn't strike me as having a 403 dimension does in fact.

Now, is there something the defense wanted to say on the DPRK's cryptocurrency capabilities?

MR. KLEIN: Yes, your Honor.

THE COURT: Okay. Go ahead.

MR. KLEIN: So, your Honor, the government moves, going back where I started, to preclude what they consider extraneous evidence.

THE COURT: Right.

MR. KLEIN: And their response or the reasons they outline why were because when we engaged in pretrial motion to compel litigation, there was a stipulation they agreed to enter into, and I think your Honor is well aware of that stipulation. Again, that was over a discovery dispute. This trial is about cryptocurrency, a blockchain, in North Korea. So any evidence that the defense would want to offer about that would seem highly relevant, particularly because it's focused around the proper time frame, which it is.

THE COURT: Relevant to what issue?

MR. KLEIN: Relevant to the issue of services, relevant to the issue of --

THE COURT: How is it relevant to the issue of services?

MR. KLEIN: Sure, your Honor.

So, again, it goes to the stipulation where the government said they won't present evidence or argument that the information my client allegedly provided in the cryptocurrency conference was not -- I'm just reading from it, your Honor, sorry -- was beyond the then existing capabilities and knowledge of the government of North Korea. And so one thing we want to show, your Honor, is that North Korea possessed tremendous cryptocurrency and blockchain capabilities prior to Mr. Griffith's visit.

THE COURT: Why is that relevant?

MR. KLEIN: Because then it would not -- he's not providing the service, your Honor.

THE COURT: Okay. Thank you. That's what I was asking.

MR. KLEIN: Sorry.

THE COURT: Well, because it's not obvious, but I wanted to find out what your reason was because I didn't want to misinterpret.

Okay. Go ahead.

MR. KLEIN: And even with this stipulation, your Honor, the government can clearly leave the impression — and they want to — they do plan to present evidence that certain individuals at the conference gained information new to them. That's included in our stipulation. So they do plan to present evidence like that, and they're also going to call an expert to talk about North Korea. Presumably, some of these issues will be ripe for discussion with their expert, if you permit their expert to testify.

THE COURT: All right.

Just bear with me. Are you finished?

MR. KLEIN: I think so, your Honor.

THE COURT: Okay. Just bear with me a moment.

(Pause)

THE COURT: All right. Much of this case is about the

fact that the defendant's position is that what he provided was information, not services, correct? That's what the defendant has argued already to me in this case. Correct?

MR. KLEIN: Yeah, we've described it as services and information, your Honor, but --

THE COURT: All right. Well, services that amount to only information, right?

MR. KLEIN: Yes.

THE COURT: Because if it's services that are more than information, then it's services, you're not in the protected zone, right?

And the government argues that you're outside that protected zone.

Now, I want to give you a hypothetical, and hypotheticals always have problems associated with them, and I realize that. But the point is, it illustrates, to me at least in thinking about it, to what extent is it relevant, from the government's standpoint or your standpoint, what technical capabilities the North Koreans had in cryptocurrency.

So here's the hypothetical:

So Country A is a country that is subject to similar types of or the same type of sanctions that we're dealing with here, and a technician in Country A downloads a manual on how to repair a Dell laptop computer, downloads it from the internet, distributes it to fellow technicians, and over time

and with practice, 20 technicians in Country A develop the ability to repair Dell laptop computers.

Now, thereafter, a lone U.S. citizen travels to Country A to repair a Dell computer, and attempts to do so. That conduct is services even though there are 20 technicians in Country A who are capable, equally capable, of doing the same thing. That's hypo one.

Hypo two: A lone U.S. citizen travels to Country A and delivers a manual and then leaves, delivers the Dell repair manual, and leaves. That appears to me to be information, not services, and that doesn't turn on whether 20 people have the manual or no one in Country A has the manual. In both of those instances, it's services by means of information which is not criminal conduct, arguably.

So that's my hypothetical, and it leads me to the conclusion that it does not matter whether or not the DPRK had capabilities in cryptocurrency. As in the first hypothetical, there are 20 people in Country A who can repair Dell laptop computers, but a U.S. person travels there with the purpose and intent of repairing a Dell computer, it's not a defense that 20 people in that country could have done so. By the same token, if it's delivering the manual, and it's only information, it doesn't become a crime because no one in that country had the manual; if the manual was available, and it's nothing other than preexisting information that is being delivered, the same

way a copy of the U.S. Constitution, a copy of the Bible, whatever it may be.

So I won't ask the pointed question. I'll ask you to react, and then I'll give the government an opportunity to react.

MR. KLEIN: Your Honor, can I have a moment to talk with my colleagues?

THE COURT: Sure.

(Pause)

MR. KLEIN: Your Honor, thank you for that moment to confer with my colleagues.

So I do appreciate these hypotheticals, and I understand that this case poses a lot of interesting, novel, and somewhat complex issues.

I think, in addressing the first hypothetical, that's not the case here, as we know. My client isn't accused of doing some sort of physical labor in a country, fixing like a plane or a car or anything like that.

When I get to number two, your Honor -- when we get to number two, and we think about what you're asking, which I think is a good question, I think what we're getting to is that the government's theory is that the information they allege my client, our client, is providing at this conference is new information, and that's what's different between, and in one and two, the information in the manual because the manual comes

after, right? It's not new information.

THE COURT: Yes, well, I gave it actually both ways. He comes with the manual, and if 20 people already have the manual or no one has the manual, it's still information. So, in a way, I'm agreeing with your point, I think. I'm probably disagreeing more with the government on this.

MR. KLEIN: Yes, your Honor, and we always appreciate that, when that happens.

THE COURT: Of course.

MR. KLEIN: But I would also say, and, again, what's also different, and I would point this out, and I think your Honor understands this, the information allegedly provided was readily and publicly available. So this Dell manual in your hypothetical may not have been readily and publicly available, but — and, again, it goes to our expert — the information provided in this case, if the government can prove it was provided, was something that is the first click on Google, was well-known and publicly available information.

THE COURT: All right.

Let me say, Mr. Klein, that that's an issue I haven't gotten to, and I'm suspecting -- I don't know whether it will be a jury question on the difference between, in my hypothetical, he physically has the manual in hand. You're raising a worthy point that I'm not deciding right this second, about what does it mean to access something on Google versus to

have already accessed it. I'm not going there.

But from your side of the table, let's start with the more optimistic one, which is if they had 20 copies of the manual, or they had no copies of the manual, they never heard of the manual, and someone puts it on the table and delivers it to them, they never heard of it, this manual has much greater value to them, but it's information in either of those instances. Whether they had the capability or they didn't have the capability, it's information, and, therefore, if it's solely information, there is not a crime. That's what I'm agreeing with. I think you're urging that, unless I'm missing something here.

MR. KLEIN: We are urging, your Honor, that this was not a crime, yes.

THE COURT: Well, I know that, but for that reason. That's more important to me. I understand you hear sweet words like "not a crime," but it's the logic that I'm asking whether you agree with.

MR. KLEIN: Your Honor, we do agree -- and, again, I know this is parsing it because it is somewhat complex, but we do agree that there was not a crime committed here because the information Mr. Griffith allegedly provided was not a service, and as I explained earlier, it was not new information, it was well-known publicly available information.

THE COURT: All right. Thank you.

Let me hear from the government. I've heard the defendant's viewpoint. I don't mind spending a little bit of time on this because this is the heart of the case, I think.

So what's the government's position?

MR. WIRSHBA: Your Honor, the government's position is that the Court has set out in its hypotheticals what the government understands to be an accurate description of the law and that those hypotheticals would directly speak to the issue that we're talking about here, which is whether or not there's relevance to the cryptocurrency capabilities of the DPRK as a whole.

Of course, the government disagrees about what it was that was actually done within North Korea, for example, and whether or not that would fall within the information or informational materials exception, of course, but with respect to the Court's hypotheticals, the government believes that the Court is spot on, and that what those hypotheticals show is that there is no relevance to the cryptocurrency capabilities of the DPRK as a whole or individuals with whom -- within the DPRK, but with whom Mr. Griffith never came in contact.

THE COURT: You want to respond, Mr. Klein?

MR. KLEIN: Your Honor — I apologize, I was just being handed a noted by my cocounsel — I think that he's summing up our view again, and I think this is right, which is, their case is premised on the idea that our client provided info to the

DPRK to do things and that information was a service, right? And that's where we land.

THE COURT: When you threw in the "right," please don't do that to me because it poses a burden on me — if I'm silent, then you must have agreed with me or something.

MR. KLEIN: Your Honor, I'm not --

THE COURT: I know, I know, it's a habit some people have.

Thank you, Mr. Klein.

So where I come out is -- and the door is going to swing both ways on a lot of this, but, no, the defense cannot offer evidence as to DPRK capabilities, and neither may the government. That's my ruling.

Now, it also comes up -- and I will jump ahead, but it's a logical jump ahead, and I apologize for jumping ahead, but the government wants to offer an expert, if I understand it, or you want to preclude them from offering an expert on such things as Korean nuclear capabilities or the like or why or how North Korea got on a prohibited list. That strikes me as being no more relevant in this case than a prosecutor in a fentanyl case wanting to explain why there are laws against controlled substances and why and how fentanyl got on the list or heroin got on the list. That doesn't come into evidence. The Court instructs on the law, and it's not probative evidence of anything. It seems to me the government is allowed to offer

evidence that they have to prove as part of their case that there is a restriction and the restriction is proven by whatever listing North Korea is on. So it can briefly do that, but not why it's on a listing or on an embargo; that's not what we're going to do here.

To the extent it has any probative value, it's outweighed by the danger of unfair prejudice.

And, similarly, I come out the same way as to the Berman Amendments. The Berman Amendment are relevant in this case. They're relevant as a legal doctrine in this case. That's for the Court to instruct. It's not why we have Berman Amendments, it's not why we have an embargo on North Korea; it's North Korea is a prohibited country and information is protected. And my job, as the judge, is to communicate these concepts to the jury clearly, maybe even repetitively, I don't know, but that's where I come out on that for both an expert on generally an explanation of why there is an IEEPA and why North Korea is on it.

Does the government want to comment on any of that? Do you accept my ruling, or do you want to tussle?

MS. RAVENER: Your Honor, we accept the Court's ruling with respect to those parties.

I think there are two points that I'd seek to clarify, and if I'm getting ahead of the Court, please --

THE COURT: No, go ahead.

MS. RAVENER: One is that with respect to the government's proffer of an expert witness, we did propose some other areas for Dr. Arrington's testimony that relate, for example, to --

THE COURT: Juche.

MS. RAVENER: -- Juche.

THE COURT: No, I read the Second Circuit's case law. I think the latest one was Judge Hall's decision in United States against Mejia. I don't know if that's the last one or the last big word in that area, and certainly experts can explain the meaning of terminology. That is not controversial.

MS. RAVENER: Understood, your Honor. That's very helpful to us and --

THE COURT: I probably said the word wrong. It's not Juche, but whatever it is.

MS. RAVENER: I can confess that the entire government team has been practicing to get that right, and I can't say that we have it right either, but Juche, I believe.

THE COURT: Okay. Whatever it is.

MS. RAVENER: So, Judge, thank you for that, and we'll adhere to those parameters. Of course, if the Court has more specifics...

With respect to the defense experts, I would just seek some further clarification as well. We concur that testimony regarding the scope, for example, of the Berman Amendment is

not appropriate from a witness, that that's left to the Court's instructions.

There are other areas along what we believe to be precisely the same lines with its expert for precisely the same reasons that the defense has proposed with respect to their OFAC expert, a former OFAC official. We did move to preclude that testimony --

THE COURT: Well, I understand. This is the under-enforcement expert?

MS. RAVENER: Correct.

THE COURT: Which the defendant argues is relevant to lack of intent. And I know that there was a decision, I believe, by Judge Nathan and one by Judge Keenan, which I've looked at, and I don't think either one of them answers — no disrespect to my colleagues, they didn't need to answer the question that I'm faced with. But it does strike me -- again, I apologize for how my brain works, all right? Everybody's brain works differently. So when I try to think about that, I do think of analogies. And the analogy that comes to mind is an illegal reentry by a person previously convicted of a serious offense, and that's a crime.

It would strike me that it is no defense to that crime that a defendant said, oh, I committed that -- I did that under the presidential administration of President A, not the presidential administration of President B, and I knew

President A was not big on enforcing the laws, so I didn't commit the crime. That strikes me as not relevant evidence and not admissible.

Now, what else they want to say in response -- I mean, the nice thing here is the defendant's case comes after the government's case. Who knows what doors the government may open. I don't know, and I'm not going to get too deeply into confining you until I know what doors have been opened, but my take is that under-enforcement evidence is not relevant evidence in this case.

So let me talk about the personal wealth and cryptocurrency holdings of Mr. Griffith. And the government does not intend to offer such evidence. They have some discrete items of evidence about possible funding of a mining node for 8 or 10 thousand dollars and funding travel to the DPRK. That seems to be of a different category, and that would come in. But the government is not allowed, and will not be permitted, to offer evidence that Mr. Griffith did or did not get rich on cryptocurrency or otherwise. It's just not relevant in this case.

The crack statement, in jest, "I'll try to be wealthy enough to pay my bail" is relevant even as a jest, not to show he is wealthy or he's planning to become wealthy; it's a statement of, yeah, I know I'm at risk of getting arrested. That's why it's relevant. It goes to consciousness and intent.

So that's why I'm not going to exclude that.

And, again, the defense moves to exclude evidence regarding involvement with Tor and the dark web. Well, the government is not going to be permitted to wander into this area and describe the defendant as a man who frequents the dark web, ladies and gentlemen, and you can only wonder what that might mean. That's not going to happen in this trial. There are specific items, for example, on the defendant's CV that may be relevant, but the defendant has to -- rather, the government has to show me why they are relevant. I don't know why they are relevant.

I mean, there is an email that Griffith sent to an individual who worked for a dark web entity where he says: I once mentioned to you the idea of doing a node in the DPRK. I was going to put an Ethereum node there, but I eventually decided it was too edgy and decided against it. However, Tor doesn't mind being edgy in these ways. If Torservers.net or others would like to crowdfund putting a Tor node in the DPRK, I'd bet they'd do it under the same conditions described below, et cetera.

That evidence comes in, and in that sense, I guess the reference to Tor on his resume makes sense. Why and where does the term dark web come in and why should it be mentioned in this trial at all?

MS. RAVENER: Your Honor, I'm not sure that the

government does intend to elicit it. I'll just reserve that. To the extent the defense does present evidence from a purported cryptocurrency expert that touches on areas that could open that door, we would reserve our right in our rebuttal case.

THE COURT: Right.

MS. RAVENER: But with respect to our case in chief, I'm not sure that we intend to offer much, if anything, on this subject --

THE COURT: Well, you'll let me know before you offer anything or the words come out of your mouth or are shown to the jury. You'll flag it for me ahead of time.

MS. RAVENER: We can do that, your Honor. And you've identified the one email and the CV, which are the documents that we currently have in mind.

THE COURT: All right. Okay.

So I've already discussed DPRK's nuclear program, et cetera.

Where it comes in, to a limited extent — and it's not really the government introducing it — it's in emails by Griffith, and Individual 3 says to him: What if they're funding their drug trade and nuclear program with crypto? And Griffith responds: Unlikely, but they'd probably like to start doing such, and he wrote an Ethereum colleague that he would not be pursuing the DPRK node because the U.S. president,

quote, "would receive a memo that says Ethereum is funding DPRK nukes."

Now, I have to ask the government, why would the fact that he's not pursuing a DPRK node be relevant to your case? Maybe the defendants want to offer it, but how is that relevant to your case?

MS. RAVENER: Your Honor, it's relevant because that statement by the defendant wasn't true. It was weeks later that the defendant contacted the other individual affiliated with Tor proposing to crowdfund putting a node in DPRK despite his claimed walking away from the subject.

THE COURT: All right. So you're saying this exchange with the Ethereum Foundation and the exchange with Individual 3 came after the email that I quoted that starts, I once mentioned to you the idea of doing a node in the DPRK; is that what you're saying?

MS. RAVENER: Your Honor, I just want to check that date. I don't want to be mistaken.

THE COURT: Sure.

Well, let me say if it's not before, then I'm inclined to exclude them. If they're after the prior communication, then I would be inclined to allow it.

MS. RAVENER: Understood, your Honor, and, regardless, we just want to get it right for you.

THE COURT: Right.

(Pause)

MS. RAVENER: Okay. Yes, your Honor. I'm looking at the dates now. So the first statement, your Honor, is from August 24th, 2018, and the second statement where Griffith actually pursues following up with trying to get someone else to follow through on the node plan is September 23rd --

THE COURT: That's the GoFundMe one?

MS. RAVENER: Correct.

Basically, offering to crowdfund the effort.

THE COURT: All right. That's presumptively admissible subject to the defense telling me that the chronology is in error or the like.

I'm going to exclude, it seems to me, CC3 sending an article from a newspaper stating that Singapore was warning to avoid nonessential travel to the DPRK because of the six nuclear tests, that if that has any probative value, it's substantially outweighed by the danger of unfair prejudice. So that does not come in.

MR. KLEIN: Your Honor --

THE COURT: Yes.

MR. KLEIN: Your Honor, with regard to the emails or messages we're talking about, we feel very strongly that you can redact the word "nuclear," and you can redact the word "drug trade," and the government would still able to get what it wants, but I think using the word "nuclear" in this

courtroom — and it's a bad pun — it would be like dropping a nuclear bomb in this courtroom, in this case. And I think there's a way -- again, we made our position clear, it shouldn't come in at all, but we think those terms could be redacted, and you get rid of what we view as an incredible classic 403 problem there.

THE COURT: Well, I'll think about it. I want to hear from the government on that — I'll give them an opportunity to get me a letter on that — but I do realize that even in the 403 analysis, it is significant that this is coming out of the defendant's mouth. That doesn't mean that anything that comes out of the defendant's mouth is excluded from 403; that's certainly not the case, and I think I've already excluded something under 403 that came out of the defendant's mouth.

It may be that in the two emails, one where it says drug trade and nuclear program, that could be redacted to read, their illicit programs and president would receive a memo that says Ethereum is funding illicit programs. But I'll give the government until Friday to get me a letter on that.

MS. RAVENER: Thank you, your Honor. We would like an opportunity to address that.

THE COURT: Okay.

There is the motion with regard to access to information after September 10th, 2020, that were the fruits of the search warrant. So, as I understand the facts, during some

period of time ending September 10, case agents reviewed the fruits of the search warrant, which was, I gather, undifferentiated contents of certain electronic storage material and segregated that which they believed was relevant, and that that material was accessed, the segregated impertinent material was accessed, after September 10, 2020, but not by anyone on the prosecution team.

The defense says, be that as it may, this is, number one, either systematic and pervasive conduct, or, number two, outrageous conduct that warrants dismissal of the indictment without a showing of prejudice.

Now, the Second Circuit has said in, I believe it was, *United States v. Walters*, a case with which I have some familiarity, that the statement in a Supreme Court decision — I don't remember the name, something like Port Huron or Port something or other — was, it appeared to the circuit, to be dicta and that no case had ever been dismissed on the systematic evasive basis, but there is such an exception recognized by the Supreme Court for outrageous misconduct.

I am going to, number one, make sure that the representation that was made with regard to members of the prosecution team accessing material is correct. I'm getting more than a mere summary statement in the August 24 letter that no one did. I want declarations from all members of the prosecution team because it appears to me that if those

representations are correct, the issue still exists and the defendant is still able to show that it is outrageous misconduct.

However, there is not, in my view, since this is not a case that's talking about prejudice to the defendant, this is an issue that can be addressed after the trial. Today, to state the obvious, is September 14th. A jury will be selected on September 27th, and, as I noted at the outset, I'm presently on trial. The issue does not disappear necessarily if Mr. Griffith is acquitted; it doesn't disappear if Mr. Griffith is convicted. If he is convicted, it may provide the basis to vacate the conviction. If he's acquitted, it may provide the basis for other remedial relief that the Court can impose, but so long as I am satisfied that the prosecution team did not access the material, I plan to go forward on September 27th. I wanted to put that on the record so that everybody knows where I am on it.

Now, are there other issues that the government wants to raise that I should address today?

MS. RAVENER: Your Honor, we do want to just note for the Court that last night, the defendant filed, for the first time, a Rule 15 motion with respect to a witness located --

THE COURT: Yes, this is the second, yes, deposition. Your time to respond hasn't even -- I don't know anything about it, to tell the truth, other than that a motion was filed.

MS. RAVENER: Thank you, your Honor.

And I just want to alert the Court that we do intend to oppose that motion.

THE COURT: And you're going to get that in on the 17th, right?

MS. RAVENER: We can --

THE COURT: Friday?

MS. RAVENER: We can do that, your Honor, with one request for the Court to consider: It is Yom Kippur this week, which has truncated our time.

THE COURT: Right.

MS. RAVENER: If it would be possible for the Court to accept our opposition on the following Monday?

THE COURT: Done. That's fine. Thank you.

MS. RAVENER: Thank you.

THE COURT: Anything else?

I'm going to get to you, Mr. Klein.

MR. KLEIN: You were just looking at me so straight, your Honor.

THE COURT: Okay. That's all right.

(Pause)

MS. RAVENER: Pardon me, your Honor?

THE COURT: One second, please.

MS. RAVENER: Yes.

THE COURT: Yes.

MS. RAVENER: Pardon me, your Honor, if you could indulge us one more moment?

THE COURT: Yes.

MS. RAVENER: We do appreciate the Court is very busy on other matters.

THE COURT: That's all right.

MS. RAVENER: We also want to note, we did file a more extensive response with respect to our proposed North Korea expert, Dr. Arrington --

THE COURT: I know.

MS. RAVENER: I know it's just filed late last night.

-- as well as to preclude certain testimony --

THE COURT: What time was it last night? I know the defendants filed one at 11:46 p.m. on Friday night. When did you file yours?

MS. RAVENER: Your Honor, we were in a similar time range.

THE COURT: I thought that.

MS. RAVENER: So we certainly don't expect to take those issues up today, but we do want to just make sure that the Court is aware we would appreciate any guidance we could receive on those issues in advance of trial and --

THE COURT: Well, wait a minute.

MS. RAVENER: -- our response to the Court.

THE COURT: Listen, your expert -- are you talking

about Arrington?

MS. RAVENER: Yes, your Honor.

THE COURT: What guidance didn't I give you today that you need?

MS. RAVENER: Your Honor, that, I think, we do understand. It's the second portion of the government's motion with respect to certain testimony that the defense seeks to offer.

THE COURT: OFAC testimony?

MS. RAVENER: No, your Honor. The defense has served subpoenas on multiple members of the FBI as well as two Department of Justice National Security Division attorneys.

THE COURT: Is this the under-enforcement issue?

MS. RAVENER: Your Honor, it appears to relate to a host of issues that we believe to be globally impermissible, inadmissible testimony. Again, the briefing is available for the Court when your Honor is ready to --

THE COURT: But, listen, I have to read it, but --

MS. RAVENER: Of course.

THE COURT: -- you're giving me a preview. You're saying when you read it, you will not know what these witnesses are for. Isn't that what you're telling me?

MS. RAVENER: No, your Honor. And let me do a better job, if I can try.

THE COURT: Okay, sure.

MS. RAVENER: I'm going to turn this over, actually, to my colleague.

THE COURT: Good.

MS. RAVENER: Thank you.

MR. WIRSHBA: Your Honor, so the government filed a brief last night, and it was very late, that attached a letter from the defense seeking to admit testimony from certain FBI agents and certain attorneys within the National Security Division related to a host of different topics. The government attached that letter and made arguments about why those topics should be inadmissible at trial.

If it's helpful, your Honor, it's Exhibit D to the motion filed last night.

THE COURT: One second, please.

(Pause)

THE COURT: So this is Exhibit A?

MR. WIRSHBA: No, your Honor. The letter from the defense is Exhibit D.

THE COURT: Hang on a second now.

MR. WIRSHBA: And the government's brief on this topic begins at page 22.

THE COURT: Well, the first topic sounds to me like the under-enforcement issue, the FBI's assessment and enforcement of the North Korea sanctions regulations. Maybe it's not precisely under-enforcement, it's enforcement

philosophy. That's that.

The second topic is FBI's coordination and communications with representatives of the Department of State regarding Griffith's alleged activities purportedly related to North Korea prior to, during, and following the cryptocurrency conference.

Why is that relevant?

MR. BUCKLEY: Your Honor, if I may, just to set the table here or set the stage for us a little bit. This letter is not a letter seeking to admit various topics of testimony. This is a letter required by the *Touhy* regulations, where we are required to provide notice to the government of the various topics that we may seek to offer testimony for. We haven't had an opportunity, obviously, to respond to the government's submission.

I will note that the government indicated in its submission that we had met and conferred regarding these topics. That's not accurate. We had a preliminary conversation to front the issue. We had agreed to have further discussions about it. And I think, in view of the Court's rulings here today --

THE COURT: There will be further discussions?

MR. BUCKLEY: Yes, your Honor.

And the other point I wanted to raise with the Court, though, is the point that the Court made earlier, which is, the

defense goes second, right -- withdraw the right, your Honor -- the defense goes second. We have to provide this notice at this stage of the proceedings. We don't know what doors they're going to open.

THE COURT: I understand, I understand, and that's true.

But what I am going to direct you to do is confer.

MR. BUCKLEY: Understood, your Honor.

THE COURT: Both sides have a bit more than what they knew before, as a result of today's conference.

Now, does that complete the government's list of things they wanted me to address?

MR. WIRSHBA: Your Honor, there is one additional thing. If your Honor is planning to take up the search warrant issue after trial, with the assistance of the declarations that you've ordered for Friday, the government would ask to be able to put over its briefing until after trial as well and supply the declarations that your Honor has requested.

THE COURT: No, no, no, no. You're going to supply the declarations -- if you're telling me you need till Monday on the declarations, that's a different story, but the declarations come before the trial.

MR. WIRSHBA: Absolutely, your Honor. We're supplying the declarations on Friday, as ordered.

The government also suggested that it might file a

brief on Friday. With the Court's permission, if the Court is putting off that issue until after trial, the government would request to adjourn that deadline until after trial, but, of course, we will be putting in the declarations as ordered.

THE COURT: Well, the thing I want you to respond to is, if you look at what I said in my order, as opposed to what the defendant is, I didn't ask you to respond to the motion to dismiss by Friday. That's not in my order.

MR. WIRSHBA: Understood, your Honor.

THE COURT: But what I did ask you to do was to respond to the defense's request for certain information. That's in my order.

MR. WIRSHBA: We will do that, your Honor.

THE COURT: Okay.

Now, with regard to the response to the motion to dismiss, I will hold that in abeyance. If I find, based on what I get on Friday, that there's a need to, I will let you know; if not, then I would put it off until after the trial.

MR. WIRSHBA: Understood, your Honor.

THE COURT: All right.

Mr. Klein?

MR. KLEIN: Your Honor, two points on that:

One was, our motion is also a motion to suppress in the alternative --

THE COURT: Yes.

MR. KLEIN: -- all the evidence that was hosted on Palantir, and that would need to be decided before trial, your Honor.

THE COURT: Yes. Well, I can tell you right now, if the government does what I've asked them to do, then implicit in my ruling that the trial goes forward, subject to your motion, if you persuade me that it's outrageous misconduct, it's a multistep process. I suppose I could just jump to dismissing the indictment or I could suppress the evidence, in which event, there may be insufficient evidence to support the indictment, but it would get you to the same place if I concluded there was outrageous misconduct.

MR. KLEIN: Your Honor, the suppression isn't premised on outrageous conduct. I think if you read our brief, your Honor, that's not the standard we need to meet.

THE COURT: Well, I have read your brief. I didn't read the brief the government filed last night. I read your brief.

MR. KLEIN: So, then, the Fourth Amendment suppression is not premised on outrageous conduct. That's not the standard that would need to be applied here for the Court to suppress the evidence we're seeking to suppress.

THE COURT: So tell me the standard. Don't hold me in suspense.

MR. KLEIN: So, your Honor, on page 9 and 10 here --

THE COURT: Right.

MR. KLEIN: If you turn to page 8, 9, and 10 --

THE COURT: Go ahead.

MR. KLEIN: I'm grabbing it, your Honor.

THE COURT: I'm not surprised you're reading it. You're trying to figure out what it is. I got it.

MR. KLEIN: I didn't intend to argue this motion today, your Honor.

THE COURT: No, I got it, I got it, there's a lot on your plate.

MR. KLEIN: So, your Honor, on page 9 --

THE COURT: Yeah, you say: Flagrant disregard of the warrant's terms, the drastic remedy of suppression of all evidence seized may be justified. All right.

And what I'm saying is, because -- listen, you found out about this on August 24th, time is short, trial was a little bit over a month away, and you didn't know everything that you knew last Friday night at 11:46, but you filed your motion Friday night at 11:46. Friday night was September 10th, today is September 14th, and we're going to trial on September 27th.

The ground that you assert is an assessment of whether it's outrageous misconduct, whether it's flagrant disregard. It's not a different standard. It's not as if there is a doctrine which said that is independent of the doctrines

intertwined with your motion to dismiss the indictment. And I'm going to take that up after the trial, and that will be true with the suppression issue.

If the government is able to make clean representations along the lines I indicated, then I am not suppressing the evidence prior to trial, I'm not dismissing the indictment, but the issue is reserved until after trial.

MR. KLEIN: Yes, your Honor.

THE COURT: That's my ruling.

MR. KLEIN: And, your Honor, one point on that point moving on.

THE COURT: Right, sure.

MR. KLEIN: In terms of members of the prosecution team who are submitting declarations on Friday, the defense would understand that would include individuals at OFAC who were involved in this case because the government -- the Court had previously found that OFAC was part of the prosecution team.

THE COURT: When did I find that?

MR. KLEIN: When we moved to compel evidence, your Honor related to OFAC, and your Honor found -- and, again, it's not precisely in those words, but your Honor ordered the government to produce evidence related to OFAC because OFAC got entangled with the FBI in terms of the investigation of this case.

THE COURT: I'll hear from the government on that one.

MR. WIRSHBA: Your Honor, that's not the government's understanding of your Honor's order when you made it with respect to OFAC. Your Honor ordered the government to conduct a review for certain materials at OFAC, but it is not the case that there are individuals at OFAC who are on the prosecution team. No one at OFAC has participated in a witness interview, reviewed any of the evidence in any of the search warrants, or any other of the indicia of being on the prosecution team.

THE COURT: Well, see, here's the issue I have: If there is a clean representation from the case agents, the prosecutors, those working with them in putting together this case, that clean representation, by my recollection of my own order, says, and that they're not aware of anyone else having access to the information.

So that would mean that if someone at OFAC did something — and maybe it's outrageous mis -- I'm not going to rule on that now, but if OFAC did something, the government, as they sit here today, the prosecution, doesn't even know what that information was. I'm not going to require them to learn the prohibited information at this juncture. So that's why, as a practical matter, I'm going to stick to where I am.

MR. KLEIN: Your Honor, moving on, we had filed a motion, a letter motion, regarding Coinbase.

THE COURT: Yes. Let me -- not to cut you off, but

let me say this about it: This is accessing something at Coinbase. You're a good lawyer, you've got a good team together, and I'm going to assume that this really wasn't thought through, but there is no set of facts under which the Court could have signed the order you proposed — none whatsoever. They, in effect, adjudicate Mr. Griffith's ownership of this account. They adjudicate whether there are any claims or liens of third persons, and this is all done without notice or an opportunity to be heard by Coinbase.

Mr. Klein, have you read the order recently? Maybe a member of your team has the order. Take a look at it.

MS. AXEL: I have it, your Honor.

THE COURT: Yes. Basically, I order nonparty Coinbase to release funds in this account to Mr. Griffith. Maybe you might have wanted to say, Judge, can you enter an order that says there is nothing in United States against Virgil Griffith, 20 CR 15, that restricts Coinbase's ability to release bonds — that might be something we could have a discussion on — but the form of the order does not work.

MS. AXEL: Okay, your Honor, yes, we have been in communications with Coinbase, and I think the fear is exactly that they just don't want to step on any toes, particularly in light of the prior briefings that we've had in this case.

My understanding is they have no objection to handing this money over to somebody and liquidating the account and, in

fact, have expressed a preference toward liquidating the account. The form of how to do that exactly, you know, I'm happy to go back to them and make sure that this form is acceptable to them and resubmit to the Court.

THE COURT: Right. But I want to hear what the government's position is on an order which says, in essence, there is nothing in United States against Virgil Griffith which precludes Mr. Griffith seeking property owned by him from a third party such as Coinbase.

MS. RAVENER: Your Honor, that does strike the government as infinitely more appropriate than the order sought by the defense, both for the procedural issues and other reasons outlined by the Court.

We will just put on the record that those funds remain subject to ongoing investigation, from the government's perspective. We have concerns about those funds. We obviously have no order restraining them — that is true, we aren't seeking one now, your Honor — but when the defense sought our consent initially, we advised them that we could not provide such consent and, in part, asked them to identify to us what was the provenance of those funds. They represented to us that those funds, they believed, to be the product of Mr. Griffith's salary at Ethereum. Based on the facts available to the government, that does not comport with what we know, and, as a result, we could not provide our consent with respect to that

particular account. All of that is just to highlight for the Court — in addition, by the way, to the lack of clarity, given Mr. Griffith's own statements, as to whether these funds could be subject to an IRS lien or have been properly accounted for here — that there could be other issues beyond any of our knowledge and that we don't believe it's appropriate to enter anything more than to say that the funds are not restricted pursuant to this criminal case, as the Court has said.

THE COURT: Okay.

So you'll get me a revised order on notice to the government, and I would ask the government to respond within two business days of receiving the proposed order.

Then, if there's no objection, and it's in a properly formed order, I'll enter it. All right?

And no harsh criticism intended by the form of the order, but I couldn't do that --

MR. KLEIN: Your Honor, we will revise it and submit it to you. Thank you for -- there's a few very minor logistical, but quick things.

THE COURT: Sure. Go ahead.

MR. KLEIN: One, we would like your Honor to permit Ms. Axel and I and anybody to bring phones and laptops into the court.

THE COURT: Well, certainly laptops, what you should do is contact my deputy during business hours, and she may be

able to assist you, but there is a form of an order that you would have to submit, and the cell phone restriction has been lifted during the pandemic for trial participants.

MR. KLEIN: Ah, okay.

THE COURT: So if you're a trial participant, it's lifted, and there's a good reason for that — because we're in a different period. I've lived through the most strictly enforced period of this pandemic, and we still have strict enforcement, but you really could not take off a facemask to communicate with a member of your staff, and you're limited, you will be limited in the number of people who will be at counsel table. So it's important that you be able to text someone to say, bring in the next witness or I need this document or the like. So that's going to be permissible. You'll be fine there.

MR. KLEIN: Yes, your Honor, we appreciate that.

Do we need to bring a copy of the docket, or we should talk to your deputy about how we --

THE COURT: No, no. I don't know how the CSOs go about it, but as Mr. Buckley could suggest, although he always waved his way in, so maybe he doesn't know anything about this, is a possibility, but usually what happened is the CSOs would call up chambers and say, there's some guy by the name of Klein who thinks he has a case before the judge, is he for real, should we let him bring his phone and --

MR. KLEIN: You can send me home some days, if you want, your Honor.

THE COURT: -- we'll take care of that, but I don't think there's any order there. If you need an order or you get hassled, then we'll give you an order, but most lawyers don't seem to have a problem with what I just described.

MR. KLEIN: Your Honor, clothes for Mr. Griffith during trial?

THE COURT: You need to get me an order.

MR. KLEIN: Yes.

THE COURT: It's an order to the marshals, and you have to supply the clothes to the marshals. Your job is to talk to the marshals and find out what they need, but one of the things they do need is an order from me. You'll get that to me, and I'll sign it.

MR. KLEIN: Yes, your Honor.

Mr. Griffith's family has inquired about, and I know you mentioned the restrictions about attendance, but obviously his parents are very interested in attending his trial and maybe some friends and family.

THE COURT: Here is the story: It's probably worth your while to go into one of the courtrooms where one of these trials are taking place. I'm, these days, up in 23B. I have no idea where this trial will take place, but there are seating restrictions, as there are today, on where you can sit and

social distancing.

So, subject to those restrictions, the family is welcome to be in the courtroom. I think what I will do for this case is provisionally set up an overflow arrangement, and the overflow room will probably be right here. So we will do that, and I think usually the CSOs are pretty good if you say it's family, if they're mother and father, not if 45 people say we're family, that might not go so well.

MR. KLEIN: Yes.

THE COURT: But if there's a mother and father, I fully expect the CSOs will accommodate in the actual courtroom rather than the overflow, but I can't guarantee that.

MR. KLEIN: Yes, one of our questions was on that.

Are exhibits handled differently now?

THE COURT: Yes. All electronic. Unless it's physical evidence, it's all electronic.

One of the things you need to do is, you need to prepare a USB drive — and this is going to be the job of the government — with all admitted exhibits and an index to the admitted exhibits. So you'll get your admitted exhibits, unless the government has already loaded them on there, and that goes into the jury room during deliberations, and they will have an electronic device -- it's not a laptop, they're going to have a full-sized large monitor, several of them, but they will be instructed on how to access the exhibits on the

USB drive.

MR. KLEIN: During the course of the trial, everything is going to be electronic, no paper exhibits?

THE COURT: No paper exhibits, yes.

MR. KLEIN: Okay.

THE COURT: And there are, I won't say, no possibility of a sidebar, but no sidebar. I finished a trial over the summer where, in two weeks, there were literally no sidebars. The case I have on trial now is a criminal case; there have been no sidebars. We take things up on breaks. I'm not saying never, I'm not saying it couldn't happen, but it's got to be something that really couldn't have been anticipated.

MR. KLEIN: Your Honor, there's one other issue, and this -- we know you don't run the MCC, but we have had real difficulty getting access to our client, and there has been some suggestion that he may be moved to the MDC and put in quarantine for 14 days, which makes it so that he couldn't -- potentially, we're not sure exactly of all the rules because they're constantly --

THE COURT: Well, that's going to be -- the government can't go to trial if there isn't a defendant. I really frown on absentee trials. So if the government wants to go to trial on September 27th, they're going to need to be able to have a defendant who can be here and can be returned to the place of incarceration, or you don't get a trial or Mr. Griffith gets

released. Those are about the only options.

I have not — and I think I would — get the warning that the MCC is going to be closed down, everybody's going to the MDC, but I think if I was down to the 72-hour mark or the five-day mark, I probably would know, and I haven't heard that yet, but it's on the government's shoulders to make sure that I have a defendant on September 27th and all succeeding days.

MR. KLEIN: Yes.

MS. RAVENER: Your Honor, that's the first we've heard of any concern of that nature, and we will look into it.

THE COURT: Okay.

MR. KLEIN: And just to be clear, we would request that he stay at the MCC through trial, assuming it's open and they don't shut the whole facility down.

THE COURT: Sure, sure. Well, yes, me, too. I'm with you on that. Great idea. I can't get it through my head what it would be like if defendants have to be produced from the MDC every day for trial. Things are -- I guess I'm requesting to be learning about that because when they lock the door on the MCC, I guess that's what will happen.

MR. KLEIN: Yes, your Honor. Thank you for -- let me just check and make sure there's nothing else, but I think that is it, your Honor.

THE COURT: Hang on now.

(Pause)

THE COURT: Well, listen, my first thanks go to my wonderful court reporter who has stayed with us tonight — thank you, Andrew — and thank you for the very fine briefing on everything. It was a pleasure to read good briefing.

MR. KLEIN: Your Honor, three seconds?

THE COURT: Yes.

MR. KLEIN: Just we're not sure how long the government's case is going to be in chief right now, so we'd ask that we get some information on that. We'd also ask for -- if your Honor has anticipation for opening statements, how long you anticipate, we'll work that out when we arrive for the trial.

THE COURT: No, no, we're not going to work it out when we arrive. This is always a painful part of the process, but I'll ask: How long does the government think it wants for its opening statement?

MS. RAVENER: Your Honor, approximately 20 minutes.

THE COURT: Okay.

And yours will be that or less, I assume, yes?

MR. KLEIN: We were hoping for half an hour, your Honor.

THE COURT: I think it's fair, then I'm going to expand the government's.

MR. KLEIN: Fine.

THE COURT: But, no, I could do that, I think I'm

going to limit both sides to 20 minutes. That should be adequate for the case. So let's limit it to 20 minutes.

Jury selection, you may or may not know -- well, what happens on the morning of trial: You're going to go to the courtroom, we're going to tell you what courtroom to go to. There will be no jurors there. But that's where we'll assemble. Then we're going to head down to the jury assembly room, and the jury selection process will take place in there. And there will be room at counsel table, generally speaking, for two prosecutors and two defense counsel and the defendant. Sometimes, in a one-defendant case, we can do better than that; I can't promise that in the jury assembly room. And then when there's a sidebar, usually, it will be one attorney from each side at the sidebar with the jurors. There's a little bit more flexibility on the final strikes. I realize that that's a little bit logistically difficult, and we can accommodate more.

What else?

MS. AXEL: Can I ask a question about that, your Honor?

THE COURT: Sure.

MS. AXEL: The COVID list that applies when we have to come into the courtroom, that basically you report if you have really any symptoms of the common cold. Is that the same list for jurors, and does that give them an opportunity to essentially avoid service or decide whether they want to

participate?

THE COURT: Well, I don't know, what did you do when you came in today? Because the questions have been changed. I personally — me, as a judge of this court — have to do this every day I am in the courthouse. There's the QR code, you scan it, you're asked the question are you fully vaccinated, and so on and so forth. If not, then you -- if you have COVID symptoms or you have been to a quarantine location or in contact with a person who has COVID, you're not immediately allowed in. What happens is, there is a COVID response team available in this court by phone that makes a determination of whether or not it is safe for that person to come into the courthouse, period. But it's not the CSOs' job to enforce that as such. If someone cannot come in under the restrictions, they should so indicate, and then we'll get an indication from the team.

But, most emphatically, we are not collecting data on whether jurors have or have not been vaccinated. An unvaccinated juror is welcome to serve. We don't say, are you vaccinated or not vaccinated? It's not part of the voir dire process. There is, obviously, the need to know -- maybe the person tested positive for COVID, we would need to know that in order to be able to restrict that person from infecting other people in the building, but that is isolated from the jury selection process.

MR. KLEIN: Your Honor, the government's estimate for the length of trial, it would also be helpful to us, your Honor, in our planning.

THE COURT: What do you think you need for the length of this trial, as I have now -- I've made it a more efficient trial for you, for one thing, right?

MS. RAVENER: Your Honor, our estimates are the same as they've always been. We anticipate that the government's case could be completed in approximately a week and may go into two, and we hope, though we don't know at all what the defense's case may be, but it may be completed in two weeks.

We'd also just note that we've already produced approximately 180 exhibits to the defense as well as 3500 material for many witnesses.

THE COURT: Okay.

So everything you've said is consistent with what I've heard and known all along, so...

MR. KLEIN: And, your Honor, hopefully, we will pick a jury and get to opening statements right away. Could we ask for the government's, at least, first day witness list a few days in advance?

THE COURT: You guys are going to talk to each other.

MR. KLEIN: Okay.

THE COURT: I'm not refereeing this. I don't want to hear about battles back and forth. Talk to each other. And

this is a case where it's likely that there will be a defense case, and sauce for the goose is sauce for the gander, and the one thing I won't tolerate, because I've actually had lawyers who have tried this, is, oh, well, you're going to give me 24, 48 hours on the government's case and your witnesses, and, of course, I'll do the same, and then it gets to the defense case, and they go ha-ha-ha, I'm not going to do that. And that would not go well. Of course, they don't say with a ha-ha-ha, they just say, oh, your Honor, this is all unexpected and I didn't know.

But talk to the government, work it out. You have things to talk about, including your subpoenas. You need to talk.

MR. KLEIN: We will do so. We have been talking, your Honor. We talked before we came in here.

THE COURT: Okay. Good. What else?

MS. RAVENER: Nothing further from the government, your Honor.

MR. KLEIN: Nothing further from the defense, your Honor.

THE COURT: Okay, that's good. So I will see you on September 27th, 9:30 a.m., in the courtroom that we're assigned to. Stay well until then. Be well.

MR. KLEIN: Thank you, your Honor.

MS. RAVENER: Thank you, your Honor. * * *